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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. ——

THE UNITED STATES OF AMERICA, PETITIONER

v.

LEIB RITTERMAN

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above-entitled cause on the 10th day of June, 1926 (R. 83), reversing the judgment of the United States District Court for the District of Vermont, an order denying a petition for rehearing having been filed in the Circuit Court of Appeals July 6, 1926 (R. 83).

QUESTION PRESENTED

The question presented in this case is when the crime of smuggling is consummated under Section

593 (a) of the Tariff Act of 1922, and whether one traveling by rail, who clandestinely introduces dutiable articles into the United States with intent to evade the payment of duty, and who by false statements to customs officers stationed abroad procures the passage of dutiable articles across the international boundary as nondutiable baggage, and who repeatedly asserts to customs officers that he has no dutiable merchandise to declare, may escape conviction on the ground that he has not completed the offense, because the dutiable articles are discovered at the customs house during a search of his person and baggage, he having finally admitted the presence of the dutiable merchandise in his baggage after the search had progressed so far as to make detection certain.

STATEMENT

The respondent, Leib Ritterman, was indicted in the United States District Court for the District of Vermont for violation of Section 593(a) of the Tariff Act of 1922, which provides punishment for smuggling or clandestinely introducing into the United States any merchandise which should have been invoiced, with intent to defraud the revenue of the United States. He was convicted, and on writ of error the Circuit Court of Appeals reversed the judgment of the District Court.

Ritterman, traveling by rail from Montreal to New York, checked as baggage a Gladstone bag containing his wearing apparel and, as it after-

wards developed, diamonds of the value of $102,077.03. To the United States inspector at Montreal, stationed there for the convenience of travelers, he declared he had no dutiable articles in his baggage. To customs officers on the train, both before and after crossing the international boundary, he made the same declaration. Under ordinary circumstances, this would have allowed the baggage to be carried to destination free from further examination by customs officers, but, entertaining suspicions as to his good faith, the customs officers asked Ritterman to leave the train at St. Albans, Vt., and there he and his baggage were taken to the customs house, where he was again asked to declare dutiable articles, and said he had none, and when asked about the diamonds said he had left them in Montreal. A search of his person and baggage then commenced, he being in one room and his baggage in another. When it became evident that discovery was inevitable, he confessed that the diamonds were in his baggage. Simultaneously with this confession by him, but not as a result of it, those searching the baggage in another room discovered the diamonds.

The Circuit Court of Appeals held that the facts of the case brought it within the doctrine of *Keck v. United States*, 172 U. S. 434, and that Ritterman had not consummated the crime of smuggling by acts committed before the obligation to pay or account for the duty arose. The Government contends that the doctrine announced in the *Keck* case

is inapplicable; that the cases are distinguishable on the facts, and that the wording of the statute on which the decision in the *Keck* case turned has been changed.

A more complete statement of the facts will be found in the supporting brief.

REASONS FOR GRANTING THE PETITION

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court and in holding that the defendant was not guilty of smuggling under Section 593(a) of the Tariff Act of 1922.

2. The Circuit Court of Appeals misapplied in the present case the doctrine of the *Keck* case.

3. The Circuit Court of Appeals erred in failing to note and giving proper effect to the omission of the words "without paying or accounting for the duty" from the present statute, which words were contained in Section 2865 of the Revised Statutes under consideration in the *Keck* case.

4. That the decision of the Circuit Court of Appeals is in conflict with the decision of that court in the case of *Newman* v. *United States*, 276 Fed. 798, in which case certiorari was refused by this Court.

5. That the question involved is one of substance relating to the construction of the statutes of the United States and is of importance in the enforcement of the Customs Laws.

For these reasons it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

OCTOBER, 1926.

BRIEF IN SUPPORT OF PETITION

OPINION OF COURT BELOW

The only opinion in this case is that of the Circuit Court of Appeals, 12 F. (2d) 849, which will be found at page 77 of the record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 10, 1926 (R. 83). A petition for rehearing was filed and entertained and was denied by the Circuit Court of Appeals July 6, 1926 (R. 83).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE STATUTE

Section 593(a) of the Tariff Act of 1922 provides (c. 356, 42 Stat. 858, 982):

> If any person knowingly and wilfully, with intent to defraud the revenue of the United States, smuggles, or clandestinely introduces, into the United States any mer-

chandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding $5,000, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the Court.

STATEMENT

On the 28th day of January, 1926, the respondent, Leib Ritterman, boarded the Central Vermont Railway train known as the Washingtonian, at Montreal, Canada, at 8.15 p. m., bound for New York by way of St. Albans, Vermont.

For the accommodation of travelers proceeding from Canada into the United States, United States customs officers are stationed at Montreal for the purpose of there examining personal baggage, to be checked as such to points within the United States. If the baggage is found to contain no unexempted dutiable articles it is corded and sealed by the customs officer at Montreal, who attaches to it a special manifest showing that there is no duty to be paid, and, under ordinary circumstances, if no suspicions are aroused, the customs officer who boards the train after it crosses the international boundary cuts the cord and seal and removes the manifest, and the baggage is there-

upon free to go to destination and be delivered to the traveler.

Article 224 of the Customs Regulations of 1923, dealing with this subject is as follows:

> Baggage examined abroad—Disposition at first port of arrival.—Baggage examined by inspectors of the United States customs stationed at places in the Dominion of Canada, if containing no dutiable merchandise, will be corded, sealed, and forwarded under special manifest as herein provided, or placed in a sealed car or compartment and accompanied by a sheet manifest.
>
> Dutiable articles and exemptions allowed, if any, will be indorsed on the manifests by examining inspectors for the information of the collector at the first port of arrival in the United States.
>
> The special manifest herein provided must be furnished by the transportation companies, and shall be made on white cardboard, not less than 2½ by 4½ inches, in the following form:

SPECIAL MANIFEST OF BAGGAGE

Check No.——

This baggage is in transit from —— (foreign country) to ——, in the United States.

I certify that this baggage was duly corded and sealed by me; that the packages have been carefully examined, passed, and laden under my personal supervision; and that there are no dutiable goods of any kind con-

tained therein nor exemptions allowed, except as noted hereon.

Dutiable goods, ———.

Exemptions allowed, ———.

———— ————.

United States Inspector of Customs.

The card manifests will be placed on the cords back of the seal. When the inspector boards a train at the first port of arrival of the baggage, he will cut the cord and retain the manifest for filing in his office.

If the baggage is to reenter foreign contiguous territory before it reaches its final destination in the United States, the cord will be cut by the inspector at the last port of arrival.

The sealing officer may keep a book record of baggage for reference.

The special manifest may show dutiable goods, but the regulation contemplates that the exemptions allowed are as much as the dutiable articles. If the amount of dutiable goods exceeds the exemptions, the sheet manifest is used and the baggage is reexamined and the duty collected at the first port of entry.

Before boarding the train Ritterman checked to New York as his personal baggage a Gladstone bag which contained some of his personal effects and in which, as it afterwards developed, he had secreted in the toes of socks, in a talcum-powder box, and in a collar box (R. 25, 30) diamonds of the value of $102,077.03. (R. 51.) Before the bag was

checked, Ritterman, according to regulations, submitted it to the United States customs inspector at Montreal for examination, then declaring, in response to questions by the inspector, that it contained only his personal wearing apparel. The inspector examined the bag, evidently in a superficial way, and corded and sealed it and attached to it a special manifest, as provided by Article 224 of the Customs Regulations, and the baggage check was delivered to Ritterman. (R. 11, 12, 13.) In the absence of suspicions by the customs officers, which might result in further examination, and under ordinary circumstances, this would have resulted in the baggage containing the diamonds entering the United States without the payment of duty. Ritterman carried other personal baggage with him when he boarded the train for New York City.

On the train, both before and after crossing the international boundary, the United States customs officers asked him if he had any dutiable merchandise to declare and he replied in the negative. (R. 17, 20.) On reaching St. Albans, Vt., he was asked to leave the train (R. 18) and go to the customs office, which he did. The Gladstone bag was also removed from the train by the customs officers and taken to the customs office. (R. 24.) Ritterman was taken into one room, where he was examined by some officials, and the Gladstone bag was taken into another room in the customs office, where it was examined by customs officials. Upon arrival at the customs house at St. Albans he was asked if

he had anything to declare. He said "No, sir." He was asked the second time "Are you sure you have nothing to declare?" and he said "I have nothing to declare." The third question was "Have you any diamonds to declare?" He said "No, sir." (R. 42, 46.) He was then turned over to another customs official, who asked him if he had in his baggage or on his person any articles intended for any other person or for sale or that he had purchased on commission for others that he had not declared to the collector and he answered in the negative. He was then told that the reason he was asked about diamonds was that the customs officer had information to the effect that he had a quantity of diamonds in his possession that day at Montreal, and he replied: "I did; I placed those diamonds in the safety deposit box of the Bank of Nova Scotia in Montreal." (R. 46.) He was then told that it would be necessary for the officials to examine his person, and he was told to remove certain of his clothing.

At that point the customs officer coming in from the other room where Ritterman's baggage was being examined asked Ritterman for the key to his baggage, which he surrendered. (R. 46.) The officer who took the key went back where the baggage was, immediately opened the bag and discovered the concealed diamonds. (R. 48.) Meanwhile, the examination of Ritterman's person proceeded. Some three, four, or five minutes after he

had surrendered the key, and after he had continued disrobing for that length of time, Ritterman told one of the officers examining him that he wanted to speak to him privately, and then he said that the diamonds were in his baggage. (R. 48.) There is no evidence that the discovery of the diamonds in his bag resulted from his confession. The jury would have been justified in finding that the officers examining the bag discovered the diamonds before Ritterman confessed they were there. At best, from Ritterman's standpoint, the discovery of the diamonds was practically simultaneous with his confession, but not the result of it.

At the trial the Court charged the jury as follows:

> If you find that the defendant falsely and fraudulently, intending to defraud the revenues of the United States, told Collector Whitehill and Assistant Collector Walsh at the Customs House that he did not have any diamonds to declare, this completed the offense of smuggling notwithstanding that later while his person was being searched by Assistant Collector Walsh at the Customs House he admitted that he had some diamonds in his Gladstone bag. (R. 67.)
>
> If the defendant intended to smuggle the merchandise in question he had an opportunity to change his mind up to the time when the obligation to pay or account for the duties arose, and if you believe that the defendant did so change his mind and did

so declare then it is your duty to find him not guilty. (R. 68.)

If you find as a fact that the defendant had no opportunity to declare the Gladstone bag because it was seized or taken from him and that his first opportunity to declare the diamonds came at the time when he was asked for the key and before his examination was completed; if you believe that he then availed himself of this opportunity, then your verdict should be not guilty. (R. 68.)

The specification of errors to be urged is contained in the petition for certiorari.

ARGUMENT

The Circuit Court of Appeals reversed the judgment of conviction on the supposed authority of *Keck* v. *United States*, 172 U. S. 434. In that case the Court considered Section 2865 of the Revised Statutes, which read as follows:

> If any person shall knowingly and wilfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce, into the United States, any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced, *without paying or accounting for the duty*, or shall make out or pass, or attempt to pass, through the custom-house any false, forged, or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and

> on conviction thereof shall be fined in any sum not exceeding $5,000, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court. (Italics ours.)

The clause "without paying or accounting for the duty," contained in the statute considered in the *Keck* case was, subsequent to the decision in that case, omitted in the reenactment of the statute by Section 593(a) of the Tariff Act of 1922.

In the *Keck* case it appeared that *Keck* had given to the master of a vessel at Antwerp a small package, which he said did not contain any valuables, with the request that the captain, whose vessel plied between Liverpool and Philadelphia, take the package to the United States and on arrival there send the package to one Van Reeth at an address in Cincinnati. Just as the vessel was coming into the dock at Philadelphia she was boarded by a customs officer, who went to the captain and asked him if he had a package for the Coeterman Diamond Company. The captain said that he had no such package, but that he had a package for a man named Van Reeth. While at first the captain did not know that he was dealing with a customs official and supposed that he was some agent of the owner of the package, he made no false statements to the customs official, he produced the package, and on request delivered it to the customs official.

The *Keck* case was argued twice, was affirmed by a divided court, and thereafter restored to the

docket and submitted, and the conviction reversed, four Justices dissenting. Emphasis is laid in the opinion on the clause " without paying or accounting for the duty " in the statute then under consideration, and which is not found in the statute here involved, but beyond that the cases are distinguishable on the facts. The gist of the *Keck* case is that no concealment or evasion or misstatement occurred at or after the time when it was the duty of the importer to declare dutiable merchandise, and it appears that the moment the vessel reached her moorings and a customs inspector boarded her and made inquiry, and at the very first opportunity for declaration of dutiable merchandise, the package was produced and delivered to customs officers.

The case at bar is quite different. In order to procure the introduction of the diamonds into the United States in his personal baggage in such a way as to escape the duty, Ritterman falsely declared to the customs officer at Montreal that his baggage contained no dutiable merchandise, and the crime of smuggling was complete within the United States when, under these circumstances and as a result of these false declarations, and taking advantage of the provisions of Article 224 of the customs regulations, Ritterman brought about the actual introduction of the dutiable merchandise into the United States as duty free; but if this be not sufficient, it appears that after the merchandise had crossed the boundary line he repeated

to the customs officials on the train that he had no dutiable merchandise, and finally, at the port of entry, St. Albans, when questioned at the customs house, he reiterated that he had no dutiable merchandise and particularly stated that he had left his diamonds at Montreal. By that time he had certainly reached the point where he was required to declare dutiable merchandise and invoice it and pay the duty thereon. It seems immaterial that the dutiable merchandise was discovered within a few minutes after his last false statements or before he was permitted to leave the customs office.

Unlike the master of the vessel in the *Keck* case, Ritterman, on reaching the point where declaration and payment of duty were required, persisted in his efforts to escape the duty and deceive the customs officials. Surely, under such circumstances, it is not necessary that the customs officers shall pretend to believe the false statements and allow the suspected individual to leave the customs office with his baggage in order that the crime of smuggling or clandestinely introducing dutiable articles be consummated; and we see no reason to believe that the Court intended in the *Keck* case to hold that, under circumstances such as are found here, the confession by the smuggler simultaneously with the discovery of the dutiable merchandise, or when a search has proceeded so far as to make discovery inevitable, leaves him immune from punishment. If such be the law, violation of this statute

is not committed in most cases until the offense of smuggling is not only complete but successful.

The facts of this case bring it squarely within the terms of the statute. The dutiable merchandise was clandestinely introduced into the United States; this was done with intent to defraud the revenue; and the point was not only reached but passed, when the goods should have been declared and invoiced.

It is believed that the case at bar falls more nearly within the facts of the case of *Newman v. United States*, 276 Fed. 798. In that case Newman, a passenger of the Steamship *Stavangerford*, arrived in Brooklyn in February, 1920, and left the ship for the pier. An inspector of Customs had Newman's baggage declaration and on the pier asked him if he had declared everything he had purchased or obtained abroad. Newman said he had declared everything. Later a Customs inspector said to Newman, "I am going to give you one more chance. If you have anything on your person, or anything you bought abroad, and have not declared it, now is your time to declare it. I want to give you every chance in the world to make a declaration." To which Newman responded, "I have declared everything. Go ahead and search me, if you want to." The inspectors then accompanied Newman back aboard the ship, entered his cabin and searched him. Two fountain pens were removed from one of Newman's pockets. Noticing

that the pen rattled the inspector asked Newman what was in the pen, to which he responded "Perhaps a couple of pieces of broken pen. It has been out of order for a couple of months," whereupon the inspector broke the pen and disclosed seven diamonds. Another pen was found on his person containing four diamonds. Finally after further pressing, the defendant Newman, took a box of tooth paste from his handbag, squeezed the tube and two more diamonds came out with the paste. The Circuit Court of Appeals in that case said:

> * * * at a time when the customs officers not only had before them a false declaration, but in addition had physical possession of part of the smuggled goods, was it requisite that they should wait until the smuggler left the customs inclosure before they could apprehend him, on the theory that the crime was only then committed? Such a construction would make a mockery of the statute, and render it in large measure useless. In this case there was not an unexecuted purpose, nor a mere attempt to smuggle, as in the Keck Case, supra. On the contrary, there is no similarity between the facts of that case and of this. Here the smuggling had been so fully executed that all that was left for Newman to do was to escape detection.

Petition for certiorari in the *Newman case, supra*, was denied by this Court (*Newman* v. *United States*, 258 U. S. 623), and this while the words

"without paying or accounting for the duty" remained in the statute.

The importance of this case, in its relation to the enforcement of the customs laws as applied to travelers, is evident, and there is reason enough to justify the issuance of the writ.

Respectfully submitted.

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SEPTEMBER, 1926.